



**NAVIGATING CROSS-BORDER
DISPUTES IN AFRICA**
WHY ARBITRATION IS THE WAY TO GO

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By Paula Kilusi and Fidel Mwaki

Cross-border transactions in Africa are a critical driver of economic activity with movement of goods, services, and capital across international borders representing a significant share of business in the region. However, these transactions can be complicated by complex legal and regulatory frameworks that can result in costly and protracted disputes. Arbitration has emerged as a popular method for resolving these disputes, offering a faster, more flexible, and more confidential process than traditional dispute mechanisms such as litigation.

CROSS-BORDER TRANSACTIONS

Cross-border transactions in Africa can take several forms ranging from typical sales of goods transaction involving transport of goods from point A to point B, supply of services by a professional firm across several countries or a complex mergers and acquisitions by entities in one jurisdiction investing in another. For instance, a South African mining company may collaborate with a local authority in Zimbabwe to explore mineral resources in that country, while a Kenyan software company may license its technology and provided technical services to a Rwandan accounting firm.

With digitalization of the world economy, cross border transactions increasingly occur online through online marketplaces where orders are sourced and placed from one country and delivered from another with little to no human interaction.

The private and public services industry is critical to success of cross border deals, for example:

- professional firms provide services in legal, tax and sales to ensure that parties to cross border deals comply with laws and follow best practices,

- transport network operators ensure goods move seamlessly from seller to buyer,
- financial institutions support flow of monies and provide custodial services,
- technology and communications service providers ensure parties can connect with each other on a variety of platforms,
- government regulators support the system by issuing licenses and regulating the business environment ensuring it is safe and efficient to do business within their jurisdiction, and
- security agencies such as border security and customs officials ensure that import and export laws are complied with especially as deals involve parties based in different jurisdictions.

Despite a robust services sector and improving infrastructure, cross border transactions are essentially commercial deals which face various constant challenges, such as:

- navigating different regulatory environments,
- managing cross-border currency fluctuations, and
- complying with local and international laws.

Disputes are common.

For example, in a cross-border joint venture between Nigerian and South African companies, disagreements may arise over the allocation of control, decision-making power, and profit distribution. Other issues that may lead to failure by one party to perform obligations include intellectual property infringement or regulatory disputes within a specific party's jurisdiction.

It is therefore important that parties understand and where possible negotiate the key dispute resolution mechanisms that shall apply to their transaction whenever signing onto cross-border deals.



ARBITRATION AS A DISPUTE RESOLUTION MECHANISM IN AFRICA

Arbitration is a form of dispute resolution that involves the parties agreeing to have a neutral third party, known as an arbitrator, decide the dispute.

Arbitration is often preferred over litigation because it is faster, more flexible, and confidential for the parties involved. Arbitration offers several advantages over traditional litigation. For instance:

- it provides a more flexible and tailored process that can be adapted to the specific needs and preferences of the parties,
- It also allows parties to choose a neutral forum and arbitrators who have the necessary expertise to resolve the dispute,
- It is generally faster and more cost-effective than litigation, which can be especially beneficial for cross-border disputes which involve higher costs, and
- In addition, it provides greater confidentiality, protecting the parties' commercial interests and reputations.

LEGAL AND COMMERCIAL CONSIDERATIONS FOR USING ARBITRATION IN AFRICA

The legal framework for arbitration in Africa is robust, with many African countries having passed arbitration laws. These laws provide a framework for the arbitration process, including the appointment of arbitrators, enforcement of arbitral awards, and grounds for challenging an arbitral award.

Additionally, the African Continental Free Trade Area (AfCFTA) Agreement, which came into force in January 2021, includes provisions for resolving disputes through arbitration. The agreement establishes an AfCFTA dispute settlement mechanism that includes mediation, conciliation, and arbitration. This framework aims to promote the settlement of disputes arising from the AfCFTA through amicable and expeditious means. As a result,

arbitration is likely to become an increasingly popular mechanism for resolving cross-border disputes among AfCFTA member states.

Several African countries have enacted arbitration laws and the choice of arbitration as a dispute resolution mechanism has been embraced by many businesses in Africa. For instance, Ghana has passed an Alternative Dispute Resolution Act which provides a framework for both domestic and international arbitration while the South African Arbitration Act also offers a legal framework for both domestic and international arbitration. Similarly, Kenya and Rwanda have laws on arbitration which provides for the conduct and recognition of arbitral awards.

However, to effectively use arbitration to resolve cross-border disputes, parties must consider and navigate several concerns, for example:

ENFORCEABILITY OF ARBITRAL AWARDS

While most African countries recognize and enforce arbitration awards, enforcement may be difficult in countries with weak judicial systems. Parties should consider potential challenges before agreeing to arbitration. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides a mechanism for the recognition and enforcement of foreign arbitral awards and has been ratified by most African countries, including Kenya, Ghana, Rwanda, South Africa among others. However, there have been cases where the courts have refused to enforce foreign arbitral awards, leading to uncertainty and potential delays in resolving disputes.

SELECTION OF ARBITRATORS

Parties can select arbitrators based on their expertise, neutrality, and experience. There are various international arbitration institutions that offer services in Africa, such as the International Chamber of Commerce, the London Court of International Arbitration, the Cairo Regional Centre for International Commercial Arbitration, the Kigali Centre for International Arbitration and the Nairobi Centre for International Arbitration.



CHOICE OF LAW

As parties may come from different legal systems, it may be challenging to choose a single law to govern the arbitration. It is, therefore, essential to identify the applicable law before commencing the arbitration. In Kenya, the Arbitration Act allows the parties to choose the law applicable to the arbitration. Similarly, in Ghana, the ADR Act allows parties to choose the law applicable to the arbitration. The parties may also choose to have the arbitration governed by the rules of an arbitration institution, which may provide a mechanism for selecting the applicable law. For example, the Lagos Court of Arbitration has a set of rules that allow parties to choose the governing law.

LANGUAGE

As parties may speak different languages, this can pose a challenge in arbitration proceedings. To avoid any misunderstandings, it is essential to agree on the language to be used in the arbitration proceedings before commencing the arbitration. In Ghana, the parties may choose the language for the arbitration proceedings, and if the parties do not agree, the arbitrator may decide the language based on the circumstances of the case,

INSTITUTIONAL VS. AD-HOC ARBITRATION

Institutional arbitration, which involves using an arbitration institution's rules and procedures, may be more suitable for cross-border disputes in Africa than ad-hoc arbitration. An institution can provide administrative support, which can be beneficial, especially when dealing with cross-border disputes. The institution may also provide a mechanism for selecting arbitrators, governing the language of the arbitration, and applying the law to the dispute. Institutions such as the Johannesburg-based Association of Arbitrators, the Cairo Regional Centre for

International Commercial Arbitration and the Nairobi Centre of International Arbitration provide administrative support for institutional arbitration proceedings.

CONFIDENTIALITY

This is one of the benefits of arbitration, but parties to cross-border disputes must be aware of the potential conflict between confidentiality and the disclosure obligations in some jurisdictions. The confidentiality of arbitration proceedings is protected under the Arbitration Act in Kenya. However, some jurisdictions may require disclosure of certain information, which may conflict with the confidentiality provisions of the arbitration agreement. For instance, in Rwanda, the law provides for the confidentiality of arbitration proceedings, subject to certain exceptions.

COST

Cost is another factor that parties must consider when using arbitration to resolve cross-border disputes. Arbitration can be more expensive than litigation, especially when dealing with cross-border disputes. Parties must, therefore, consider the costs of arbitration before agreeing to use it, and

SEAT OF ARBITRATION

The seat of arbitration refers to the legal jurisdiction in which an arbitration is deemed to be situated, and it plays a crucial role in the conduct and enforcement of arbitral proceedings. The choice of seat determines the legal framework within which the arbitration will take place, including the applicable procedural rules, the supervisory court, and the extent to which the courts of the seat can intervene in the arbitral process. This choice also has significant implications for the enforceability of the resulting award, as courts in different jurisdictions may take varying approaches to recognizing and enforcing foreign arbitral awards.

It is therefore clear that as you do business in Africa, choose your “forum” carefully.

CONCLUSION

Arbitration has emerged as a powerful tool for resolving cross-border transaction disputes in Africa. The legal framework for arbitration in Africa is well-developed and provides a strong foundation for parties seeking to resolve disputes while the AfCFTA Agreement should further bolster the use of arbitration in cross-border transactions. Despite the inherent complexity of cross-border transactions, they present a significant opportunity for economic growth and development of economies across Africa. By thoughtfully implementing effective arbitration processes, parties doing business in Africa can navigate the challenges and achieve favorable outcomes in their cross-border transactions.

AUTHORS PROFILE



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